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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 276

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, AND LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 25-31) is not yet officially reported. The Board's decision and order (J.A. 18a-69a[1]) are reported at 143 NLRB No. 28.

JURISDICTION

The decree of the court of appeals (Pet. 32) was entered on April 16, 1964. The petition for a writ of

[1] The Joint Appendix in the court below will be referred to as "J.A." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

certiorari was filed on July 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, Section 8(d)(3) of the National Labor Relations Act required the Union to serve a timely notice of dispute with the federal and state mediation services prior to calling the employees out on strike in support of its contract demands.

2. Whether substantial evidence supports the Board's finding that the employees were discharged for engaging in a strike which violated Section 8(d) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at pp. 3–5 of the petition.

STATEMENT

1 *The Board's Findings of Fact.*—The Fort Smith Chair Company, a furniture manufacturer, had collective bargaining relations with petitioners (herein jointly called the Union) for more than 20 years (J.A. 19a, 42a; 450a, 80a). Their last collective bargaining agreement had a termination date of June 1, 1961 (J.A. 19a; 86a). By letter dated March 27, 1961, the Union gave the Company 60 days' notice, as called for by Section 8(d)(1) of the National Labor Relations Act and by the existing agreement, of a desire to terminate that agreement and to negotiate a new one (J.A. 19a–20a, 44a; 451a, 488a–489a, 80a).

The parties held negotiating sessions on May 29 and 31, 1961 (J.A. 20a, 45a; 451a, 80a). The Union asked the Company for a number of changes in the terms of the expiring agreement, including a general wage increase (J.A. 45a; 80a, 88a–90a, 92a, 122a, 247a, 468a, 471a–472a, 483a). The Company made several counterproposals, including a provision for grievance meetings outside of, instead of during, working hours and a revision of the current provisions for the determination of incentive pay (the so-called "no vested rights" clause) (J.A. 45a; 450a, 453a–463a, 476a–479a, 493a–496a, 80a, 90a, 240a–241a). The Company agreed to certain Union proposals for modifications in the arrangements for holiday pay, and the Union apparently agreed to one suggestion made by the Company (J.A. 45a; 91a, 122a–125a, 245a–247a, 273a, 337a–338a).

No other areas of agreement, however, were found. Accordingly, at the end of the second negotiating session, the Union stated that it would extend the existing contract for one year with the changes upon which the parties had already agreed (J.A. 22a, 45a–46a; 271a, 353a, 358a, 398a). The Company replied that it had to have a change in the provision governing incentive pay rates and some limitation on grievance meetings during working hours. It requested the Union to submit the Company proposal to the membership (J.A. 46a; 80a, 100a–101a, 262a–265a, 297a, 345a, 398a–400a, 479a, 503a).

That evening, the Union submitted the Company's last contract proposal to the membership, with a rec-

ommendation that it be rejected (J.A. 47a; 101a–103a, 501a). By an overwhelming margin, the membership turned down this proposal and voted to strike (J.A. 47a; 110a, 123a, 180a–181a, 207a–208a). The strike began the following day on June 1, 1961 (J.A. 47a; 76a, 123a, 8a, 15a). Neither the Federal Mediation and Conciliation Service nor the State Department of Labor had received the 30-day notice called for by Section 8(d)(3) of the Act (J.A. 20a, 45a; 80a, 452a).

On June 6, Federal Mediator Wheeler advised Company Attorney Bethell, in a conversation which arose in connection with the affairs of another client, that he had received no notice under Section 8(d) of the Act with respect to the contract dispute involving the Company, and indeed, had had no prior knowledge that a contract was even being discussed (J.A. 273a–274a, 300a). On the following day, the Company and the Union met in another negotiating session, suggested and attended by Wheeler; this was the first session in which any government mediator participated (J.A. 47a; 110a–111a, 172a, 184a, 300a). The Company stated that it would proceed with the meeting, subject to the understanding that it was reserving any right it might have if it found that the 8(d) notices were not sent or received (J.A. 268a, 352a). The Union replied that it understood this (J.A. 268a). Wheeler met with each party separately (J.A. 111a, 269a).

On June 8, 1961, the Company verified that the government mediators had never received the notice of dispute called for by Section 8(d)(3) (J.A. 300a).

Thereupon, it notified the Union by telegram that, because the current strike was unlawful, the Company would not continue negotiations and the strikers' employment was terminated (J.A. 20a, 47a; 115a, 499a). Within the next few days, the Company notified each of the strikers that he was being discharged because of his participation in the strike (J.A. 20a, 47a–48a; 8a–11a, 15a–16a, 76a–82a, 116a–118a, 452a, 500a, 501a). The Company did not discharge the Union members on its checkoff list who did not take part in the strike (J.A. 8a–11a, 15a–16a, 76a–82a, 118a–119a). It was stipulated by all parties, including Union counsel, that the persons discharged pursuant to these letters were discharged by the Company "by reason of their participation" in the strike (J.A. 72a–73a, 80a, 452a–453a).

On June 12, 1961, the plant resumed production with new employees (J.A. 48a; 355a). These employees were hired at wage rates somewhat different from those being paid before the strike, and the Company made these changes without consulting the Union (J.A. 48a; 374a–375a). On December 15, 1961, the Union notified the Company that the strike had been terminated, and applied for reinstatement of the strikers (J.A. 48a; 502a, 224a). The strikers were denied reinstatement, but some were rehired as new employees (J.A. 48a; 61a–64a; 16a–17a, 76a, 214a–215a, 278a–279a).

Upon charges filed by the Union, the General Counsel of the Board issued a complaint alleging that the Company violated Sections 8(a) (3) and (1) of

the Act by discharging the strikers, and Section 8(a)(5) by thereafter refusing to bargain with the Union (J.A. 5a–12a).

2. *The Board's Conclusion and Order.*—The Board (with one Member dissenting) concluded that the complaint should be dismissed. The Board held that the strike was unlawful because it was called without serving any notice of dispute on federal and state mediation services as required by Section 8(d)(3) of the Act. The Board rejected the Union's contention that the obligation to serve such notices rested solely on the Company because it was the Company and not the Union which was seeking to change the existing contract. The Board found that the Union was not seeking the old contract but rather "*a contract with modifications already agreed upon* in the course of negotiations" (J.A. 22a) (emphasis in original). In any event, the Board determined that, since the Union was the party which first proposed a termination and modification of the existing agreement, the duty to serve the Section 8(d)(3) notice rested on it. For, to "make this section's continued applicability to the party initially desiring the change turn on the unpredictable course which the ensuing bargaining may take is to bring the disquiet of a potential lockout or a strike into an area where Congress wanted quiet—indeed, a 'cooling off' period" (J.A. 21a–22a).

The Board further found that the Company had discharged the employees because of the unlawful nature of the strike, and not out of a desire to rid

itself of the Union (J.A. 22a–23a).[2] Therefore, the Board held that the Company did not violate the Act by discharging the strikers, and, since the strikers' employee status was lawfully terminated, in breaking off relations with the Union (J.A. 27a–28a).

3. The Court of Appeals' Decision.—The court of appeals sustained the Board's findings and conclusions, and its dismissal of the complaint (Pet. 25–31).

ARGUMENT

The decision below is plainly correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

1. Section 8(d) of the Act provides that no party to a collective bargaining agreement "shall terminate or modify such contract, unless the party desiring such termination or modification" has served a written notice of such intention upon the other party sixty days prior to the expiration date of the contract and—

> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simul-

[2] Two members of the four-man Board majority went on to hold that, even if the Company's motivation had been discriminatory, it would have been privileged in discharging the strikers under the provision in Section 8(d) that an employee who engages in a strike within a particular period loses his status as an employee (J.A. 23a–27a). That position was not adopted by a Board majority (see J.A. 23a, note 10; 28a–29a) or ruled on by the court of appeals (Pet. 28, note 3).

> taneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time * * *.

The Union did not file the requisite notice with the federal and state mediation services before striking, and it apparently does not deny that this omission would be sufficient to make the strike unlawful had it been "the party desiring * * * termination or modification" of the existing contract.[1] Petitioners seek to avoid this conclusion here on the ground that the Company, rather than the Union, was the party seeking termination or modification of the agreement, and was thus obligated to serve the 8(d)(3) notice. This contention rests on two assumptions: (1) that although the Union originally desired to modify the existing agreement, it later was willing to extend the old agreement without change; and (2) that the responsibility for serving the notice required by Section 8(d)(3) does not rest with the party who first proposes termination or modification of the existing agreement, but changes with the course of the bargaining and finally devolves on the party who last insists on contract modification (Pet. 12, 16-19). The first assumption is contrary to the Board's findings, and the second is legally without merit.

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[1] See *Local Union 449, Retail Clerks International Association, AFL-CIO* v. *National Labor Relations Board*, 265 F. 2d 814 (C.A. D.C.); *International Union of Operating Engineers, Local No. 181* v. *Dahlem Construction Co.*, 193 F. 2d 179 (C.A. 6); *Brotherhood of Locomotive Firemen and Enginemen* v. *National Labor Relations Board*, 302 F. 2d 198 (C.A. 9).

As the court below noted (Pet. 29), "the Board found that the [Union's] extension offer related to the contract not in its original form but as embodying the concessions made by the Company in the course of the negotiations looking towards a new contract." Accordingly, on the Board's findings, which are supported by the record (see p. 3, above), while the Company had agreed to the modifications still sought by the Union, the Union was at all times demanding some modification in the terms of the existing contract. The Union was therefore a party seeking modification of the contract at the time of the strike and was required to give notice under Section 8(d)(3).

In any event, as the court below held (Pet. 29–30), the Board properly interpreted Section 8(d) as "putting the responsibility for giving the required notices * * * upon the party to the contract who raises the possibility of industrial conflict by moving to open up the existing contractual arrangements." For, unless there is a "fixed and definite responsibility for notifying the public agencies," there is danger "that the public interest in the emollient intervention of the mediation services will fall between the two stools of contending parties wholly intent upon the uncertain—and frequently fluctuating—fortunes of their negotiating positions" (Pet. 30). Here, the union plainly began the negotiations.

The cases relied on by petitioners (Pet. 19–20, 21–22) are inapposite. *Mastro Plastic Corp.* v. *National Labor Relations Board*, 350 U.S. 270, held that Section 8(d) does not apply to a strike protesting employer unfair labor practices; here there is no show-

ing that any unfair labor practice by the employer occurred prior to the strike. *Local Union No. 9735, United Mine Workers* v. *National Labor Relations Board*, 258 F. 2d 146 (C.A. D.C.), merely holds that a strike to attain an objective not covered by the agreement is not a strike to modify the agreement within the meaning of Section 8(d); the strike here clearly related to terms and conditions encompassed by the agreement between the parties.

Procter & Gamble Independent Union v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (C.A. 2), certiorari denied, 374 U.S. 830, involved the question whether the requirement in Section 8(d)(4) that the contract be kept in effect "for a period of sixty days after such notice is given" referred solely to the 60-day notice of termination or modification of the contract specified in paragraph (1) or also to the 30-day notice to the mediation services specified in paragraph (3). The court said that the failure to meet the requirement of paragraph (3) did not affect paragraph (4). Petitioners read this decision as applying as well to the loss-of-status provision of Section 8(d), which states that any "employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute * * *." Therefore, petitioners assert that *Procter & Gamble* is in conflict with the Board's determination that strikers lose their status as employees under Section 8(d) when they strike more than 60 days after the paragraph (1) notice is given where the union has failed to file mediation notices under paragraph (3). It is unnecessary, however, to

decide here whether this view of Section 8(d) is correct. A majority of the Board found the strike here to be unprotected without regard to the effect of the "loss-of-status" provision because the Union did not serve the notice required by paragraph (3), and the court of appeals did not find it necessary to consider this issue at all. See p. 7, note 2 above.

2. Petitioners further contend (Pet. 13–16) that, even if the strike was violative of Section 8(d) of the Act, the strikers were not discharged for that reason but because the Company desired to rid itself of the Union. The Board and the court below found to the contrary (J.A. 22a–23a; Pet. 31), and hence this contention presents a purely factual issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. In any event, the finding is amply sustained by the record. The Union stipulated that the strikers were discharged because of their participation in the strike, the Company's letters to the Union and to the individual strikers gave the strike as the sole reason for the discharges, and the Company did not discharge the employees whom it knew to be Union members but who did not participate in the strike (see p. 5 above).

Petitioners also contend (Pet. 12–13, 16) that, even if the strike were unlawful on the Union's part, the Company nevertheless was not privileged to discharge the employees for that activity, absent a showing that the employees knew of the Union's failure to comply with Section 8(d)(3). It has uniformly been held, however, that employees who participate in activity

which constitutes an unfair labor practice on the part of their union representative lose the protection of Section 7 of the Act. See *National Labor Relations Board v. Puerto Rico Rayon Mills, Inc.*, 293 F. 2d 941, 947 (C.A. 1); *National Labor Relations Board v. Thayer Co.*, 213 F. 2d 748, 755–756 (C.A. 1), certiorari denied, 348 U. S. 883; *Local Union No. 1229, International Brotherhood of Electrical Workers v. National Labor Relations Board*, 202 F. 2d 186, 187–188 (C.A. D.C.), reversed on other grounds, 346 U.S. 464; H. Rep. No. 510, 80th Cong., 1st Sess., pp. 38–39, 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 542–543.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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